UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

AARON T. KINZEL,	)	
	)	
	)	
v.	)	Civ. No. 04-01-B-W
	)	
STATE OF MAINE,	)	
	)	
	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2254 PETITION

Aaron Kinzel has filed a petition for habeas relief pursuant to 28 U.S.C. § 2254. (Docket No. 1.) Kinzel stands convicted of several offenses, including attempted murder, all arising from a confrontation with police officers in Aroostook County in Maine, after the eighteen-year-old Kinzel and his fifteen-year-old girlfriend ran away from their Michigan homes and arrived in Maine in a stolen car. Kinzel raises four grounds in his federal petition. The State has responded, arguing initially that Kinzel's § 2254 petition is untimely because, accounting for the time that his state post-conviction and appeal were pending, a full year elapsed between the time his conviction became final and the filing of this § 2254 petition. I decline to deny Kinzel federal relief on this ground for the reasons explained below. However, I agree with the State vis-à-vis its alternative argument and recommend that the Court **DENY** Kinzel's petition.[1]

[1] Kinzel has also filed a reply to the State's response. Therein there are a few points that pertain to the grounds discussed below and I have considered these. However, this disjointed reply asserts concerns entirely new to this § 2254 proceeding, such as the failure of his attorney to pursue (non-specified) pre-trial motions. I have not considered these scatter shots.

Discussion

Statute of Limitations Analysis

The United States Congress has provided that:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]

28 U.S.C. § 2244(d)(1)(A). Congress has also indicated that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." Id. § 2244(d)(2).

The criminal judgments against Kinzel were entered on the state's trial court docket on October 23, 1998. Kinzel's twenty-day period for taking an appeal expired on November 12, 1998, without Kinzel having filed an appeal. On March 1, 1999, Kinzel signed a petition for state post-conviction review, and for purposes of this petition, the State is willing to take that as the date of filing (giving Kinzel the benefit of the "prisoner mail-box rule" rather than the March 9, 1999, docketing date). Thus, for those 109 days no application for state post-conviction review was "pending" under § 2244(d)(2).

After being entirely rebuffed by the post-conviction court, Kinzel met with success in his appeal of that determination, but only with respect to one of his grounds: that he had instructed his attorney to file an appeal but that his attorney had not done so. The Maine Supreme Court, sitting as the Law Court, reinstated Kinzel's right of appeal concluding that the post-conviction court had improperly placed the burden on Kinzel in

demonstrating that his right to appeal was denied by Counsel's conduct. The Law Court's wrote:

> Aaron Kinzel appeals from a judgment entered in the Superior Court, (Aroostook County, *Mead, C.J.),* denying his petition on post-conviction review. Kinzel contends that his trial attorney neglected to file a notice of appeal after he had asked him to file the notice. His trial attorney denied that Kinzel had ever asked for an appeal. The post-conviction court found both Kinzel and the attorney credible, but concluded that Kinzel failed to sustain his burden of proof.
>
> The United States Supreme Court has held "that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores- Ortega, 528 U.S. 470, 477 (2000) (citing Rodriquez v. United States, 395 U.S. 327(1969)). The post-conviction court's finding that Kinzel's assertion is credible indicates that Kinzel did not consent to the decision not to file an appeal. *Id.* Under the unusual circumstances of this case, we hold that Kinzel has made a sufficient showing that his trial attorney did not act in a reasonable manner.

Kinzel v. State, 2002 WL 84, ¶¶ 1-2, 797 A.2d 731, 731. The Law Court left intact the post-conviction court's judgment as to Kinzel's other grounds, some of which appear in a different incarnation in the present § 2254 petition.

The appeal reinstated, Kinzel's attorney filed a notice of appeal with the Law Court arguing two grounds: one, Kinzel's due process rights were violated when he waived his right to a jury trial as he made the decision under the stress and anxiety of a prolonged period of pre-trial detention and, two, that it was error for the trial court to admit the testimony of a detective regarding a videotape played at the trial and to allow the use of still photographs made from this video. The Law Court rejected Kinzel's appeal, concluding that the trial court's evidentiary ruling were not an abuse of discretion and that the waiver of the right to a jury trial ground had been previously found to have no merit by the post-conviction court, a disposition that became final when the Law

Court denied Kinzel a discretionary appeal. The Law Court's decision vis-à-vis the direct appeal was filed on December 17, 2002.[2]

Giving Kinzel the benefit of the ninety days that he could have sought certiorari review from the United States Supreme Court, his conviction became final on March 17, 2003. According to the State, Kinzel had only 256 days left to file his 28 U.S.C. § 2254 petition, which elapsed (by my calculations) on November 28, 2003. Even with the benefit of the prisoner mail box rule, Kinzel's § 2254 petition, signed on December 22, 2003, would be unquestionably, though not remarkably, out of time per the State's calculations.

At first blush, I was inclined to agree with the State's equation. And, if the relief that Kinzel received in his post conviction had been anything other that a reinstatement of the right to a direct appeal, I probably would have. However, the Maine Law Court's reinstatement of Kinzel's right to appeal can be viewed as rewinding that 109 days in which nothing was pending prior to the institution of Kinzel's post-conviction. How else could have Kinzel remedied counsel's alleged failure to file the notice of appeal than by pursuing post-conviction relief? And once the Law Court ordered the reinstatement of the right to appeal, Kinzel claims pursued in that appeal were not finally adjudicated and exhausted within the meaning of 28 U.S.C. § 2254(b)(1)(A). If Kinzel had attempted to file his § 2254 petition during the pendency of his reinstated direct appeal, it is likely that this Court would have rebuffed his efforts citing this failure to exhaust at least some of his § 2254 claims. After all, § 2244 provides that the one-year timer starts running on

[2] During this time period in which his post-conviction was "pending" for § 2244(d)(2) purposes, Kinzel also attempted to appeal his sentence. However, this was resolved unfavorably to Kinzel well before the resolution of the post-conviction/reinstated appeal and in no way impacts the § 2244(d)(1) analysis.

"the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2244(d)(1)(A) (emphasis added).[3] Viewed in this perspective, Kinzel's one year began to run on March 17, 2003, and the petition is timely. Therefore, I do not recommend following the State's recommendation of denying Kinzel's petition on statute of limitations grounds.

Merits of Kinzel's Four Grounds

Grounds One and Two

In Ground One Kinzel complains that his attorney did not completely advise and consult with Kinzel prior to electing not to file a direct appeal and notes that the Law Court agreed with this contention. In Ground Two, Kinzel laments the fact that the post-conviction court placed an improper burden on Kinzel in proving his attorney's incompetence on this score, and, again, Kinzel notes that the Law Court confirmed this. These grounds are not cognizable in this 28 U.S.C. § 2254 petition as the Maine Law Court gave Kinzel the relief that he sought when it reinstated his right of appeal. To state the obvious, with Kinzel having been granted his relief by the Law Court, there is no § 2254 remedy to be had as there is no state court adjudication vis-à-vis these two grounds that is holding Kinzel in custody in violation of the federal constitution or federal laws. 28 U.S.C. § 2254(a).[4]

---

[3] I am not comfortable with the State's argument that Kinzel should have used due diligence to discover his appeal was not pending and that his failure to do so justifies counting this period towards his one year. The fact is that the Law Court decided that Kinzel was entitled to pursue his appeal and it was not until that appeal was resolved that his conviction was "final" according to § 2244(d)(1)(A).

[4] In his reply to the State's response Kinzel states that his attorney was grossly unprofessional and suggests that he is pursuing a malpractice claim through the Fifth Amendment. Habeas is not an action for damages.

Grounds Three and Four

The State concedes that Kinzel has adequately presented his § 2254 claims to the state courts and that those courts have had the opportunity to adjudicate the merits of his claim. See Adelson v. DiPaola, 131 F.3d 259, 263 (1st Cir. 1997). Accordingly, the claims are exhausted as required by 28 U.S.C. § 2254(b)(1)(A).

With respect to the parameters of this Court's review of the state courts' determinations:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.§ 2254(d). Any determinations of factual issues are presumed correct. Id. § 2254(e) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

As the State notes, the United States Supreme Court's Penry v. Johnson provides good guidance on the § 2254(d) analysis:

> Last Term in Williams v. Taylor, 529 U.S. 362 (2000), we explained that the "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have independent meaning. Id., at 404. A state court decision will be "contrary to" our clearly established precedent if the state court either "applies a rule that contradicts the governing law set forth in our cases," or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different

> from our precedent." Id., at 405-406. A state court decision will be an "unreasonable application of" our clearly established precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." Id., at 407-408.
>
> "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id., at 409. Distinguishing between an unreasonable and an incorrect application of federal law, we clarified that even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable. Id., at 410-411.

532 U.S. 782, 792-793 (2001).

Admittedly, the state court decisions discussed below are not weighty with analysis of the applicable federal law, but the deferential § 2254 review must proceed even when there is little fodder to feast on. See Norton v. Spencer, 351 F.3d 1, 5 -6 (1st Cir. 2003); see also Schaetzle v. Cockrell, 343 F.3d 440, 443 (5th Cir. 2003) ("Because a federal habeas court only reviews the reasonableness of the state court's ultimate decision, the AEDPA inquiry is not altered when, as in this case, state habeas relief is denied without an opinion."). While the state court did not dress its analysis in elaborate federal garb, it is apparent from the opinions that the claims were considered according to the theory pursuant to which Kinzel presented them. Compare DiBenedetto v. Hall, 272 F.3d 1, 6 (1st Cir. 2001) ("It is correct that when the state court has addressed the federal constitutional issue, it is its ultimate outcome, and not its rationalization, which is the focus. But that does not mean the deferential standard applies where the state court has not addressed the constitutional issue.").

The First Circuit has placed these review standards in the context of the Sixth Amendment inquiry for ineffective assistance of counsel, relying on the Supreme Court

precedents of Strickland v. Washington, 466 U.S. 668 (1984) and Williams v. Taylor, 529 U.S. 362 (2000):

> To demonstrate ineffective assistance of counsel in violation of the Sixth Amendment, [the § 2254 petitioner] must establish (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984); see also Scarpa v. DuBois, 38 F.3d 1, 8 (1st Cir.1994). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.
>
> To prevail on his habeas petition, however, [the § 2254 petitioner] must demonstrate not just that the Strickland standard for ineffective assistance of counsel was met, but also that the [state court's] adjudication of his constitutional claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," Williams v. Taylor, 529 U.S. 362, 405 (2000), or if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a [different] result," id. at 406. A state court decision involves an "unreasonable application" of clearly established federal law if "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.
>
> The Supreme Court has made clear that "an unreasonable application of federal law is different from an incorrect application of federal law." Id. at 410. Therefore, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411, 120 S.Ct. 1495; see also Hurtado v. Tucker, 245 F.3d 7, 15-16 (1st Cir.2001).

Mello v. DiPaulo, 295 F.3d 137, 142- 43 (1st Cir. 2002).

Ground Three

In his third ground Kinzel asserts, as he did in his reinstated direct appeal, that his due process rights were violated when he waived his right to a jury trial. In a conclusory fashion he states that there was evidence before the post-conviction court that clearly established that Kinzel waived his right "solely on the imprisoned duress conditions

inflected upon him." He complains that trial counsel never fully explained all the constitutional rights he was waiving.

Waiver "of constitutional rights in the criminal process ... must be a 'knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances.'" Iowa v. Tovar, __ U.S. __,124 S. Ct. 1379, 1383 (Mar. 8, 2004) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)). With respect to the waiver of the right to a jury trial the Seventh Circuit has aptly summarized such claims:

> Because a trial by jury is a constitutional right (see, e.g., Duncan v. Louisiana, 391 U.S. 145, 149 (1968)), which may be waived by a defendant in favor of a bench trial, Patton v. United States, 281 U.S. 276, 298 (1930), only if the waiver is voluntary and knowing, Brady v. United States, 397 U.S. 742, 748(1970), this argument goes both to [the § 2254 petitioner's] Sixth Amendment right to a jury trial and to ineffective assistance of counsel.

Milone v. Camp, 22 F.3d 693, 704 (7th Cir.1994). Kinzel's claim in his § 2254 petition is that his attorney's poor advice concerning the waiver was responsible for violating his Sixth Amendment right to a jury trial.[5]

On this score, the post-conviction court wrote:

> Attorney Carpenter strongly suggested that Petitioner waive jury. In support of this strategy, attorney Carpenter concluded that the testimony and evidence would be highly emotionally charged and the issue was a narrow legal one which needed to be considered in a calm, rational manner. Attorney Carpenter feared that the average juror would

[5] It appears from the face of the record submitted by the State that the trial court did not comply with Maine Rule of Criminal Procedure 23 in a case that was indisputably governed by that rule rather than Rule 22. All that I have before me is a copy of Kinzel's waiver form which is NOT signed by the judge and a docket entry reflecting its filing. There is no indication of a hearing being held on the waiver and the testimony at the post-conviction hearing suggests that the discussion was limited to counsel and client. My decision in no way passes judgment one way or the other on the constitutional dimensions of the Maine rules pertaining to waiver, see Singer v. United States, 380 U.S. 24, 36-38 (1965), nor is it meant to suggest that something more or less might be required, see Tovar, 124 S. Ct. 1379.

Furthermore, under the § 2254 paradigm, this Court does not inquire into the tos and fros and pros and cons of the actual proceedings in the trial court. In this case the state post-conviction court had an evidentiary hearing and fully adjudicated these claims and the federal court is limited to reviewing the legal and factual findings of the post-conviction court.

> find it difficult to consider the legal defense without being overwhelmed by the emotionality of the facts. He felt that an experienced judge would be more likely to look past the emotionally charged facts to the defense.
>
> The Petitioner initially opposed the waiver and the matter was set for jury trial. After trial was postponed, Petitioner advised Carpenter that he wished to waive jury as he was anxious to get the matter concluded. Carpenter feels that the Petitioner had made "... the right decision for the wrong reason...".
>
> The record reflects that attorney Carpenter fully reviewed the issue of jury waiver with the Petitioner. The Petitioner made the decision to waive jury thereafter and did so with the full knowledge of the implications and consequences of his actions. As such, this court had little difficulty in finding a knowing and voluntary waiver.

(Post-conviction Dec. & J. at 2-3.) On direct appeal the Law Court observed that "the issue of Kinzel's knowing and voluntary waiver of a jury trial was decided adversely to him by the post conviction court (Mead., J.). A discretionary appeal of that issue was denied and therefore the issue cannot be raised on the direct appeal of his conviction." (State v. Kinzel, Mem Dec. Dec. 17, 2002, at 1-2) (citations omitted).

The post-conviction court's factual findings concerning Kinzel's waiver of his right to a jury determination and counsel's conduct on this score are presumed correct, § 2254(e), and Kinzel has proffered no factual basis to rebut these findings beyond his conclusory protestation that he was under the stress of a prolonged pretrial detention. This, the post-conviction court fully considered when finding waiver based on the testimony it received (see, e.g., Post-Conviction Review Tr. at 14-26, 46-51, 58-59, 73-79, 88-91, 97-99). The Supreme Court in Tover reiterated: "'[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances--even though the defendant may not know the specific detailed consequences of invoking it.'" 124 S. Ct. at 1389 (quoting United States v. Ruiz, 536

U.S. 622, 629 (2002) and stressing that court should heed this guidance). It is fair to say that the court concluded that at the time Kinzel waived his jury right he knew what he was doing and "'his choice [was] made with eyes open.'" Tovar, 124 S. Ct. at 1387 (quoting Adams v United States ex rel. McCann, 317 U.S. 269, 279 (1942), and counsel was not ineffective for not dissuading him, Strickland, 466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."). Analyzed through the prism of 28 U.S.C. § 2254(d) and (e), I conclude that Kinzel is not entitled to § 2254 relief on this ground.

Ground Four

In his fourth ground Kinzel faults the trial court for admitting the videotape and the still photos made from the videotape and allowing a trooper to testify thereto. He claims this was obvious error and that trial counsel was ineffective for not successfully challenging the evidentiary rulings.[6]

In its ruling on the state post-conviction, the Court reflected that Kinzel and his attorney

> viewed a videotape of the incident which was shot from a camera mounted within the police vehicle. Both agreed that the videotape did not provide any significant evidence on the issue of intent – the angle of the camera did not permit the viewer to determine whether the gun was aimed in the direction of the Trooper or simpl[y] pointed straight out the window. Neither party suggested that the video be reviewed by an "expert." As the court cannot conclude that the viewing of the video by an expert would have provided significantly more insight, counsel cannot be faulted for failure to arrange for such. The court does not consider the officers'

[6] In his reply to the State's response Kinzel states that he is in the process of having the video tape transferred to a DVD format so that this Court can review them for structural error by the trial judge. However, this standard of § 2254 review does not tolerate this sort of reevaluation of the merits of a state trial court's evidentiary ruling.

> detailed viewing of the video tape and their testimony regarding such to be expert testimony.

(Post-conviction Dec. & J. at 2.) On direct appeal the Law Court stated: "Contrary to [Kinzel's] contention, the court did not abuse its discretion in permitting an investigating officer to testify about video and audio tapes as they were being played for the court and about still photos made from the videotapes." (State v. Kinzel, Mem Dec. Dec. 17, 2002, at 1.)

In essence, Kinzel's complaint in this ground is a quibble with an evidentiary ruling (as opposed to a constitutional claim, such as those implicating the confrontation clause). Federal habeas relief is not available simply on the ground that the state court erred in admitting certain evidence. Puleio v. Vose, 830 F.2d 1197, 1204 (1st Cir. 1987).[7] Of course here, as in the state courts, Kinzel has added the layer of an ineffective assistance of counsel claim to the mix. Kinzel seems to believe that there was some angle for challenging this evidence that would have lent support to his assertion that he did not have the requisite intent when he fired from the car, but he does not provide any details as to what he thought counsel should have done on this score at trial. See Strickland, 466 U.S. at 690 ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."). The post-conviction court and the Law Court both concluded that there was no abuse of discretion in admitting the evidence and that the testimony relating to the video and stills was not "expert testimony." I can identify no grounds for Strickland deficiency of performance despite Kinzel's discontent let alone one that might justify unsettling, by way of § 2254(d), the post-conviction

[7] If anything, the stakes for a defendant in admitting evidence in a bench trial are far lower than when evidentiary mistakes are made in a jury trial.

court's conclusion that counsel was not ineffective vis-à-vis the treatment of this evidence at trial.

Conclusion

Because I conclude that this 28 U.S.C. § 2254 motion, if timely, has no merit, I recommend that the Court **DENY** Kinzel relief.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

April 30, 2004.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

KINZEL v. WARDEN, MAINE STATE PRISON
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 01/05/04
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Plaintiff

AARON T KINZEL represented by **AARON T KINZEL**
MAINE STATE PRISON
807 CUSHING RD
WARREN, ME 04864-4600
PRO SE

V.

Defendant

WARDEN, MAINE STATE PRISON represented by **CHARLES K. LEADBETTER**
ASSISTANT ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333-0006
626-8800
Email: charles.leadbetter@maine.gov
ATTORNEY TO BE NOTICED